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ELEMENTS OF ESTATE PLANNING

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ESTATE PLANNING is the process of arranging or rearranging a person's property so as to accomplish the purposes for which he expects to acquire or already has acquired the property. For the younger person the process usually is one of arranging the disposition of property yet to be acquired; for the older person, that of rearranging property already acquired.

I.

PARTIES TO ESTATE PLANNING.

Under present-day conditions, estate planning, is, distinctly, a co-operative process.

A.

Lay Advisers.

The first party to the estate planning process must, as a matter of course, be the property owner himself. He is the person whose property is to be arranged or rearranged and whose purposes are to be accomplished by the proposed plan.

After him come the persons who are to be the beneficiaries of his plan. These persons usually are his wife (or her husband) and other competent and mature members of his family. Then come the persons who have been and are his confidants and advisers about his business, financial, and other affairs related to his property. These usually are his business associate and his banker. All these may be grouped and called the lay advisers.

B.

Specialists.

After these lay advisers come the specialists. They include the life insurance man whose function is to advise on matters related to life insurance; the tax man to advise on tax matters; the investment man, on investments; the accountant, on matters of accountancy; the realtor, on matters related to real property; and possibly others, each of whom is a specialist on some aspect of the proposed estate plan.

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C.

Fiduciary.

Another party to the estate planning process is the person who himself or whose institution is expected to carry out the estate plan if, as, and when it becomes operative. He or the bank or trust company he represents will be expected to settle the property owner's estate as executor and to administer his trusts. The executor and trustee-to-be should be made a party early in the process. He should be there to advise with respect to the administrative, as distinct from the legal, aspects of the plan and to say whether or not he or his institution will be willing to accept appointment as executor or trustee, or both, to carry the plan out.

D.

Lawyer.

Finally, there is the lawyer who, along with the property owner himself, is an indispensable party to the completion of every estate plan. He really serves in a triple capacity. He gives lay advice on business, financial, and personal matters related to the plan; he gives professional guidance at every step in the creation of the plan; and he draws all of the legal documents requisite to making the plan operative and effective.

Mayo Adams Shattuck used to call these parties the estate-planning team and the lawyer, the captain of the team.

Seldom, if ever, would all or even most of these parties meet as a group to work upon anyone's estate plan. Nonetheless, the advice of every one of these parties may be needed, sooner or later, at one time or another, in working out the property owner's estate plan.

II.

PROCESS OF ESTATE PLANNING.

The process of estate planning involves two activities. The first, to borrow for the moment the terminology of the chemist, is analysis; the second, synthesis. Analysis is taking things apart; synthesis, putting them back together.

A.

Analysis.

Analysis, in turn, involves two activities. One is analyzing the property; the other, the needs of the beneficiaries.

1. *Analysis of property.*

The property of the average person is not an estate in the sense of being an organized, correlated body of property. Instead, it is only a collection of largely unrelated items of property. It may be likened unto the collection of building material on the lot awaiting conversion into a building. The function of the estate planner, like that of the builder, is the conversion of unrelated items into an integrated whole—in one case a building, in the other an estate. In the one case as in the other, the builder or the planner must know what material he has to work with. For the estate planner this is analysis of the property.

2. *Analysis of needs of beneficiaries.*

The next and the all-important analysis is that of the needs of the beneficiaries to be provided for under the estate plan. In providing for a given beneficiary the law gives a property owner an almost unlimited variety of choices. Not only may he make outright gifts, gifts in trust, and gifts through appointment but also he may vary the terms of the trust and of the power of appointment to fit the needs of the beneficiaries. But, of course, the estate planner does not and cannot know which of the many dispositive devices to employ unless or until he knows the needs of the beneficiaries.

B.

Synthesis.

Synthesis likewise involves two activities. One is arranging or rearranging the property to serve the needs of the beneficiaries; the other is to adapt the administration and the disposition of the property so as best to serve those needs.

1. *Arrangement or rearrangement of property.*

Synthesis of the property included in the estate plan may and often does involve major changes. It may require sales, purchases, and conversions. It may require the purchase of additional life insurance or changes in existing policies. It may require incorporation of businesses that theretofore had been conducted as sole proprietorships or partnerships. It may require gifts, living trusts, and insurance trusts.

2. *Adaptation of property to needs of beneficiaries.*

The very heart and soul of estate planning is the adaptation of the available property to the needs of the beneficiaries. The needs of no two beneficiaries are precisely the same. The needs of one man's wife will be served best by an outright gift; of another's, by a gift

in trust. The needs of one child of the same family will be served best by one type of gift or trust; those of another, by another type. Professor Austin Scott of the Harvard Law School has said that the purposes for which trusts can be created are as unlimited as the imagination of lawyers. The adaptation of the estate plan to the numerous and varied needs of the beneficiaries is the supreme challenge of the estate planner.

III.

THE LAWYER'S SPECIAL FUNCTIONS.

As we already have said, in the estate-planning process the lawyer has a threefold function—that of giving legal guidance at every step, that of serving as a friend of the family in offering business, financial, and personal advice, and that of drawing all of the legal documents requisite to making the plan operative and effective. Now, let us be more specific as to the special functions of the lawyer in the estate planning process.

A.

Urging Patience and Deliberation.

The average property owner thinks of planning an estate, if the term has any meaning at all for him, as consisting only of making a will. Too often he thinks of making a will as a necessary nuisance. It should not be surprising, therefore, that nearly one-half of the property owners in the United States die without a will.

Even as to the making of a will, much less the orderly planning of an estate, he wants to get it done and over with just as soon and just as painlessly as possible. Frequently, he waits until he is about to go on a long, hazardous trip or to the hospital for an operation. Then he rushes into his lawyer's office, says that he wants to make a will, and expects the lawyer to have the will written and ready for execution that afternoon or, at the latest, the next day.

It is not always easy—frequently, it is difficult, sometimes impossible—for the lawyer to make his client understand that there is a great deal more to planning an estate than making a will, that a good will must be made in the light of the property to be disposed of and the needs of the beneficiaries of the property, or that a will that does not fit the property or the needs of the beneficiaries may be worse than no will at all. Sometimes the lawyer is almost driven by his urgent and impatient client into making a “temporary” will for him; and the temporary will—to be changed when he returns from his trip or from the hospital—often becomes the permanent will.

One of the special functions of the lawyer is to urge his client to be patient and deliberate and to take the time needed to work out his estate plan and after that to make his will or to create his trusts so as to adapt his estate to the needs of his beneficiaries.

B.

Enlisting Other Advisers.

Another practical problem of the lawyer may be that of making his client realize that he needs the services of advisers who are specialists on the different aspects of his estate plan—such as, the insurance man, the tax man, the investment man, the accountant, the realtor, and the executor and trustee-to-be. First, the lawyer may have to combat and overcome his client's attitude of secretiveness. He may not want "everybody to know his business." He even may withhold from his own lawyer information about his affairs and his family that the lawyer must have in order to plan his estate and draw his legal instrument properly. Then there may be the feeling on the part of the client that the lawyer himself should know all the answers, that he is and should be an investment specialist, a tax specialist, and an accountant as well as a specialist in the law. The lawyer himself welcomes the specialists in other fields; the client may not realize the need for them.

Very frequently, in some parts of the country much more than in others, the lawyer has a real problem in having his client select his executor and trustee-to-be and call him in for advice as to the administrative aspects of the estate plan and as to the acceptability of the projected plan. Whenever a property owner names an individual or a bank or trust company his executor or trustee without consulting beforehand with the individual or with a responsible representative of the bank or trust company, he has no assurance whatever that the one he names will accept the appointment.

C.

Keeping Tax-saving in Proper Perspective.

Every lawyer knows that tax-avoidance and tax-saving, important and fully justified as they are, must, nevertheless, be kept subordinate to the needs of the beneficiaries.

Tax-saving within the law and good conscience is not only justified but also is the duty of the property owner. In fact, it is only by every property owner's saving and avoiding all taxes that he can

avoid within the law and good conscience that the tax burden ever can be equalized, even approximately.

Having said this, one should go on to say that in recent years many property owners have become so tax-conscious that they are disposed to sacrifice the best interests of their beneficiaries if by so doing they can save some taxes. Sometimes when they go to their lawyer about planning their estate the thought uppermost in their mind is saving or avoiding taxes.

The lawyer engaged in estate-planning practice has no greater obligation to his clients and their beneficiaries than that of seeing that their clients do keep tax-saving in proper perspective.

D.

Keeping the Irrevocable Trust in Its Proper Place.

There are sound reasons, as every lawyer knows, for making trusts irrevocable which have nothing whatever to do with tax-saving or tax-avoidance. But, every lawyer knows also, that tax-saving is the main-spring of most irrevocability.

The average property owner is inclined to think that his estate and his beneficiaries always will remain the same as they are the day he plans his estate and makes his will. If his estate plan calls for the creation of a living trust or insurance trust and he knows or is informed that he can save taxes by making it irrevocable, he is inclined to make it irrevocable.

As every lawyer who has been engaged in estate-planning practice any appreciable length of time well knows, within a very few years after a client has planned his estate and created one or more living trusts or insurance trusts, major changes do take place in his property, in his beneficiaries, in the needs of his beneficiaries, and, most important of all, in his own ideas about providing for his beneficiaries. Or changes in the tax laws may have rendered inappropriate an estate plan that had been made only a few years before.

Thereupon the property owner returns to his lawyer and asks him to go over his trust agreement, saying that he thinks he may want to make some changes in it. When his lawyer reminds or informs him that his trust is irrevocable and that, therefore, he cannot make the desired changes but must let the trust stand as it is, the client not only blames himself for having been led into making the trust irrevocable in order to save some taxes, but also, and much worse, he blames his lawyer, frequently without any justification whatsoever, for having led him into making the trust irrevocable.

No trust should be made irrevocable unless there are sound reasons, other than tax-saving alone, for doing so and then the client should be informed definitely, clearly, and emphatically what irrevocability really means. Lifetime irrevocability is a dangerous device in estate planning. The short-term or Clifford trust with its ten-year irrevocability has gone a long way towards removing the dangers of irrevocability. But not even irrevocability for a limited period should be included in the estate plan unless or until the client really understands what it means and approves the idea.

IV.

CHARACTERISTICS OF PRESENT-DAY ESTATE PLANNING.

Any older lawyer engaged in estate-planning practice who compares the wills and trust agreements he has drawn in recent years with those he drew when he was a younger lawyer, say only fifteen or twenty years ago, is impressed by two major changes that have come about in wills and trust agreements within that comparatively short period. One is the flexibility of the dispositive provisions of present-day instruments compared with the older ones; the other is the breadth of the powers granted the modern executor and trustee compared with the narrowness or the dearth of the powers granted them in former years.

A.

Flexibility of Dispositive Provisions.

The flexibility of the dispositive provisions is revealed in (1) the power of the trustee, in the exercise of his or its uncontrolled judgment, to pay over or apply principal as well as income in order to meet the needs of the beneficiaries, (2) the right granted the beneficiary himself to call for principal as well as income and to terminate or continue the trust, and (3) the power of appointment granted the beneficiary.

1. *Trustee's powers.*

In order to put and keep the trustee in a position to meet and serve the unpredictable as well as the emergency needs of the beneficiaries, property owners are going a long way towards giving the trustee power to use income and principal in the way or ways that, in his or its judgment, will serve the needs of the beneficiaries as they arise from time to time in the light of changes in the beneficiary as well as in the economy.

2. *Beneficiary's rights.*

Under present-day wills and trust agreements it is not at all uncommon to give the beneficiary, provided he or she is adult and competent, the right to call for principal as well as income and, after the beneficiary has attained a stated age, at his option either to terminate the trust or to continue it for a stated period or for his lifetime. Giving adult and competent beneficiaries such broad rights is reconciling them to trusts where, in the absence of such rights, they would resent having their share of an estate "tied up" in a trust.

3. *Powers of appointment.*

The Revenue Act of 1942 brought special powers of appointment and the Revenue Act of 1948, carried over into the Revenue Code of 1954, brought general powers of appointment into unprecedented prominence and popularity. The property owner, instead of trying himself to fix unalterably the ultimate disposition of his property, gives someone else—a wife, or husband, or son, or daughter—either general or limited power to dispose of the property in the light of "wisdom based upon later facts." At the present time in planning an estate that will or may be subject to Federal-estate-tax liability, in taking advantage of the marital deduction, in the vast majority of cases the wife (or the husband) is given a special power of appointment during her (or his) lifetime and a general power at her (or his) death.

B.

Breadth of Administrative Powers.

One of the truly notable characteristics of the modern will and trust agreement is the breadth of the administrative powers granted the executor and trustee. At the present time draftsmen seem determined to make it impossible for the executor or trustee to excuse himself by saying, "I know that I should have done that but I did not have the power to do it," or "I know that, for the good of the beneficiaries, I should not have done that but under the terms of the will or trust agreement I had to do it."

Draftsmen are incorporating in the instrument not only all of the administrative powers that they think the executor and trustee probably *will* need to exercise but, in addition, many other powers that the executor or trustee *may* need in the settlement of the estate or administration of a long-term, family trust.

To be specific: Here is a will of twenty-four pages, seven pages of which are devoted to the powers of the executor and trustee. A

mere listing of the headings of those powers will show their number and variety. Without distinguishing between the powers of the executor and of the trustee, each of them, to the extent that the exercise of the power is appropriate, is granted the power: To (1) postpone distribution (applicable to executor only); (2) retain original investments; (3) make new investments; (4) carry on businesses; (5) carry on farms; (6) manage real property; (7) receive additional property into the trust; (8) sell and exchange property; (9) deal with other trusts; (10) borrow money; (11) register property in the name of a nominee; (12) vote shares of stock in person or by proxy; (13) exercise options, rights, and privileges; (14) participate in reorganizations; (15) reduce interest rates; (16) modify or release guaranties; (17) renew and extend mortgages; (18) foreclose on and bid in mortgaged property; (19) insure in both mutual and stock companies; (20) collect; (21) compromise; (22) employ and compensate agents and other representatives; (23) hold property of two or more trusts undivided; (24) establish and maintain reserves; (25) make distributions in cash or kind; (26) pay to or for minors; (27) apportion or allocate receipts and expenses; (28) administer trusts in general terms for "benefit of"; and (29) rely upon evidence. The real meaning and extensiveness of these powers can be appreciated only by the reading of the provisions of which the foregoing are only the headings. Experience in administration has taught executors and trustees and their legal advisers that it is a great deal better to have an excess of powers, some of which may never be exercised, than to lack powers that may be essential to the proper and economical administration of the estate.

V.

COURSES IN ESTATE PLANNING.

In the field of legal education one of the most noteworthy developments of recent years has been the introduction of courses in estate planning. The law student of only ten or fifteen years ago never heard of such a course. At the present time most of the law schools are offering such courses, however not always under the name, estate planning. In these courses the aim is not so much to teach the students law they had not learned in other courses, but, rather, to teach and show them how to use the law they had learned in other courses.

Perhaps it will be worth while to describe in some detail one such course in estate planning. It is an elective course open only to third-year students in the second semester of their last school year. It is a seminar and not a lecture course. The number of students taking the

course is limited to about twenty, not over twenty-five at the outside. The instructor prepares beforehand a hypothetical case designed to bring up for discussion all of the points about the property and the beneficiaries and about the disposition and administration of the property likely to arise in the making of the estate plan. Accompanying the statement of the case is an outline of the points of discussion and an up-to-date bibliography on each of the points.

The instructor and the students sit around a big table. The instructor asks the students to think of themselves as junior members of a large law firm and of the instructor as the senior member of that firm. A client of the firm has come in to have his estate planned and the underlying instruments drawn. The instructor as the senior member makes up a statement of the case and refers it to each of the junior members and sets him to work on the planning of the estate and the drafting of the will underlying the plan.

About the middle of the course each student is required to write an informal letter to the client outlining in layman's language the proposed estate plan, involving, as it probably will, substantial changes in the present property and, perhaps, the creation of living or insurance trusts or business trusts in addition to the will. Then at the end of the course each student is required to submit for grading a will, complete with dispositive and administrative provisions, signed and witnessed, ready to be filed away. The will is graded on four points as follows: Legal soundness, 30%; practical workability, 30%; clarity, simplicity, and accuracy of language, 20%; and neatness and over-all appearance, 20%; maximum total, 100%. In grading the instructor attaches to each will, which is returned to the student, a memorandum on the commendable as well as the criticizable points of the instrument submitted by him.

The aims of the course are twofold. The first, as already stated, is to teach the student how to apply in his estate-planning practice what law he has learned in other courses. The second is to relieve him of the dread that every young lawyer must have of a client's calling upon him to help plan his estate and draw the instruments. In a word, the estate-planning course is designed to do for the student in his estate-planning practice what the moot court is designed to do for him in his trial practice. Although these estate-planning courses are comparatively recent developments in the field of legal education, it already is quite noticeable that they have encouraged young lawyers to welcome estate-planning practice and to pride themselves upon their draftsmanship.